APPENDIX

The STATE, Respondent,

v.

Horace BUTLER, Appellant.

No. 21647.

Supreme Court of South Carolina.

Feb. 22, 1982.

Defendant was convicted before the General Sessions Court of Charleston County, C. Anthony Harris, J., of murder and was sentenced to death, and he appealed. The Supreme Court, Ness, J., held that: (1) juror, who stated that he could return life imprisonment if he thought that was warranted, was properly qualified; (2) there were no actions by victim that constituted legal provocation and thus charge on voluntary manslaughter was not required; (3) required notice was given defendant when he was indicted before the grand jury for murder and his constitutional rights were not violated because indictments failed to specify any statutory aggravating circumstances to be passed on by grand jury prior to actual trial of case; and (4) evidence was sufficient to submit aggravating circumstance of rape to jury.

Affirmed.

1. Jury ⇐108

Juror, who on voir dire stated that he could return life imprisonment if he thought that was warranted, was properly qualified.

2. Criminal Law ⇐376

Where, immediately prior to disputed question whether defendant was "known to carry a gun," same witness testified that defendant was carrying a pistol on night of murder, witness' disputed testimony was merely cumulative since it did no more than bolster fact that witness was aware of pistol on defendant's person, and thus there was no error in admitting testimony on theory that defendant's character had not been put in issue.

3. Criminal Law ⇐517(8)

Where defendant was not provided with copy of statements when they were made due to malfunction of copy machine at police station but was given a copy three weeks later, prior to preliminary hearing and approximately four months before trial, defendant had ample time to prepare his case after receiving copy of confessions and was not prejudiced by failure to provide him with a copy at time statements were made. Code 1976, §§ 8-15-50, 19-1-80, 19-1-90.

4. Homicide ⇐33

Voluntary manslaughter is unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.

5. Homicide ⇐45

Where death is caused by use of deadly weapon, words alone are not sufficient to constitute legal provocation required for voluntary manslaughter.

6. Homicide ⇐309(6)

Since there were no actions by victim that constituted legal provocation, charge on voluntary manslaughter was not required pursuant to request of defendant, who alleged that after victim openly seduced him, redressed herself and calmly informed him that she was going to "cry rape" because she needed an excuse for arriving home late, he "panicked" and shot her.

7. Criminal Law ⇐1208(1)

Statutory death penalty scheme was purposefully designed to withhold matters inadmissible on issue of guilt or innocence from jury until that issue has been determined; this system affords greater protection to accused since imposition of death by public authority is so "profoundly different" from any other sanction. Code 1976, § 16-3-25.

8. Indictment and Information ⇐71.1

Requirement that a defendant receive notice of charges against him does not require that aggravating circumstances be set out in indictment for consideration by

grand jury and thus constitutional notice requirements were met when defendant was indicted before the grand jury for murder and his state constitutional rights were not violated because indictments failed to specify any statutory aggravating circumstances to be passed on by grand jury prior to actual trial of case. Code 1976, §§ 16-3-10 et seq., 16-3-26, 17-19-20; Const.Art. 1, § 11.

9. Criminal Law ⇐741(1)

A trial court is concerned only with existence of evidence, not its weight, and any evidence, direct or circumstantial, reasonably tending to prove guilt of accused creates jury issue.

10. Homicide ⇐354

Evidence was sufficient to submit aggravating circumstance of rape to jury based on trial court's findings that victim received blow to her head prior to death, that defendant was armed with deadly weapon, that semen was present in victim's vaginal area, that semen could have come from male of defendant's blood type, and that victim was killed thereafter.

11. Criminal Law ⇐789(7)

In prosecution for murder, definition of reasonable doubt as "a substantial doubt for which an honest person seeking the truth can give a real reason" and as "not a weak or slight doubt" but a "serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state" was within acceptable guidelines.

12. Criminal Law ⇐768(3)

Failure to instruct on consequences of hung jury resulted in no possible prejudice where each member of jury was polled and there was no indication of disagreement.

13. Criminal Law ⇐1206(2)

Where record reflected that defendant maliciously and purposefully committed brutal murder accompanied by rape, death penalty was proportionate to crime and defendant. Code 1976, § 16-3-25.

David I. Bruck, of S. C. Commission of Appellate Defense, Columbia, and W. McAlister Hill, Ravenel, for appellant.

Atty. Gen., Daniel R. McLeod, Asst. Atty. Gen., Lindy P. Funkhouser and Senior Asst. Atty. Gen., Brian P. Gibbes, Columbia, and Asst. Sol., Steve Schmutz, Charleston, for respondent.

NESS, Justice:

This is a death penalty case. Butler was convicted for the murder of Pamela Lane and sentenced to death. We affirm.

First Butler asserts certain jurors were wrongfully disqualified from jury duty due to their unwillingness to impose the death penalty. This issue has been decided adversely to appellant and is without merit. *State v. Linder*, S.C., 278 S.E.2d 335 (1981); *State v. Hyman*, S.C., 281 S.E.2d 209 (1981).

[1] Appellant also argues juror Jennings V. Knight should have been disqualified alleging his answers on voir dire indicated he would automatically vote in favor of the death penalty. We disagree. Knight was questioned as follows:

By Defense Counsel:

"Q. Would you automatically send him to death?

"A. Well, according to the evidence what was in the court, what we judged him by." (Tr. 385, f. 18-20).

By the Court:

"Q. Could you return life imprisonment if you thought that was warranted?

"A. Yes." (Tr. 389, f. 5-7).

Considering the entire colloquy with this venireman it is clear that he was properly qualified. *State v. Gilbert & Gleaton*, S.C., 283 S.E.2d 179 (1981). This exception is without merit.

[2] Appellant next argues the trial court erred in admitting testimony that appellant was "known to carry a gun" where appellant's character had not been put in issue. Immediately prior to the disputed question the same witness testified appellant was carrying a pistol on the night of the murder. (Tr. 727, f. 17, to 728, f. 8).

This testimony was merely cumulative since it did no more than bolster the fact that the witness was aware of a pistol on appellant's person. There was no error. *State v. Blackburn*, 271 S.C. 324, 247 S.E.2d 334 (1978).

[3] Appellant asserts the trial court erred in admitting into evidence two written confessions since appellant was not provided with a copy of these statements when made. This was due to a malfunction of the copy machine at the police station. Butler was given a copy three weeks later, prior to the preliminary hearing and approximately four months before trial.

Appellant argues this violated S.C. Code § 8-15-50, § 19-1-80 and § 19-1-90 since a copy was not provided *at the time the statement was made*. We disagree.

South Carolina Code sections shall not be applied in a hypertechnical manner. *State v. Jones*, 228 S.C. 484, 91 S.E.2d 1 (1956). There is nothing in the record to indicate there was any prejudice to appellant's rights. See generally, *State v. Crenshaw, et al.*, 274 S.C. 475, 266 S.E.2d 61 (1980); *State v. Scott*, 269 S.C. 438, 237 S.E.2d 886 (1977). Clearly, appellant had ample time to prepare his case after receiving a copy of the confession. Appellant is due a fair trial, not a perfect one. This exception is without merit.

Appellant contends the trial court erred in refusing to charge manslaughter. He told police on the night of the murder he stopped to talk to the victim and invited her to go for a ride. He stated the victim voluntarily ditched her brand new motorbike in the bushes and got in his car. He then drove to a secluded, wooded area where the deceased openly seduced him, re-dressed herself and calmly informed him that she was going to "cry rape" because she needed an excuse for arriving home late. Appellant said he "panicked" and shot her, then dumped her body over a bridge into a stream.

[4, 5] Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation. *State v. Norris*, 253 S.C. 31, 168 S.E.2d 564 (1969). Where death is caused by the use of a deadly weapon words alone are not sufficient to constitute a legal provocation. *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130 (1951).

[6] There were no actions by deceased to constitute legal provocation, hence a charge on voluntary manslaughter was not required. This argument has no merit.

Appellant next claims his state constitutional rights were violated because the indictments failed to specify any statutory aggravating circumstances to be passed on by a grand jury prior to the actual trial of the case. We disagree.

[7] "The purpose of the bifurcated trial proceeding is to permit the introduction of evidence at the pre-sentence hearing that normally would be inadmissible at the guilt determination proceeding." *State v. Shaw*, 273 S.C. 194, 208, 255 S.E.2d 799 at 806 (1979). Our statutory death penalty scheme was purposefully designed to withhold matters inadmissible on the issue of guilt or innocence from the jury until that issue has been determined. *State v. Shaw*, supra. Also see *Eberheart v. State*, 232 Ga. 247, 206 S.E.2d 12 (1974). This system affords greater protection to the accused since the imposition of death by public authority is so "profoundly different" from any other sanction. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) as cited in *State v. Shaw*, supra, 255 S.E.2d at 805.

[8] We agree with appellant that fairness and due process of law require that the defendant receive notice of the charges against him sufficient to enable him to prepare his defense. S.C. Code § 17-19-20 (1976); *State v. Hiott*, 276 S.C. 72, 276 S.E.2d 163 (1981); *State v. Tabory*, 262 S.C. 136, 202 S.E.2d 852 (1974). We disagree, however, with the assertion that this notice requires the aggravating circumstances be set out in the indictment for consideration by the grand jury.

The punishment for a crime is not and never has been considered a part of the pleading charging a crime. The indictment

here is for murder, not rape. The statute charging the crime defines murder and provides for notice and due process. S.C. Code, § 16-3-10, et seq. (1976).

Notice is sufficient where the statutory requirements are met. The statute does not require the aggravating circumstance to be included in the indictment. S.C. Code § 16-3-26 (1976). Moreover, appellant concedes he was given sufficient notice.

The required notice referred to by appellant in Article I, § 11 of the S.C. Constitution was met when appellant was indicted before the grand jury for murder. The death sentence he received was for murder, not for the aggravating circumstance, rape. There is no error.

[9] Appellant asserts there was insufficient evidence to submit the aggravating circumstance of rape to the jury. A trial court is concerned only with the existence of evidence, not its weight. *State v. Gunter*, 273 S.C. 347, 256 S.E.2d 317 (1979). And the evidence must be viewed in the light most favorable to the State. *State v. Hill*, 268 S.C. 390, 234 S.E.2d 219 (1977), cert. den., 434 U.S. 870, 98 S.Ct. 211, 54 L.Ed.2d 147 (1977). *Any* evidence direct or circumstantial reasonably tending to prove the guilt of the accused creates a jury issue. *State v. Hill*, supra.

[10] The trial court found: (1) the victim received a blow to her head (serious enough to cause brain damage) prior to death; (2) the appellant was armed with a deadly weapon; (3) the presence of semen in victim's vaginal area; (4) physician's testimony that semen could have come from a male of appellant's blood type, and (5) decedent was thereafter killed. There was sufficient evidence to submit the aggravating circumstance to the jury. This argument has no merit.

Appellant alleges the trial judge erred in instructing the jury on the law of reasonable doubt and in failing to instruct the jury of the consequences of a "hung jury."

[11] Appellant relies on *In The Matter of Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) where the U. S. Supreme Court held that a defendant cannot be found guilty of a criminal offense without establishing his guilt "with utmost certainty." *Id.* 1073. Here the trial judge defined reasonable doubt as ".... a substantial doubt for which an honest person seeking the truth can give a real reason," and as "not a weak or slight doubt, but it is a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state." We recently held, "[i]t is not error to equate substantial doubt with reasonable doubt." *State v. Griffin*, S.C., 285 S.E.2d 631 page 633.

These instructions are well within the acceptable guidelines set by this Court and *In re Winship*, supra. There is no error present.

[12] Moreover, each member of the jury was polled and there was no indication of disagreement. The jury's verdict here was unanimous thus no possible prejudice resulted.

Finally, the constitutionality of § 16-3-25(C)(3) has been fully settled by this Court and appellant's exception alleging otherwise is without merit. *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979), cert. den., 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329.

[13] We are required under § 16-3-25 to determine whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases. *State v. Shaw & Roach*, 273 S.C. 194, 255 S.E.2d 799 (1979). The record clearly reflects appellant maliciously and purposefully committed a brutal murder accompanied by rape. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case.

We have carefully reviewed the entire record for any prejudicial error and find none. Appellant's murder conviction and death sentence are affirmed.

AFFIRMED.

LEWIS, C. J., and LITTLEJOHN, GREGORY and HARWELL, JJ., concur.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 82 5028

HORACE BUTLER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, Horace Butler, respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court. The affidavit of petitioner in support of this motion is attached hereto.

Presented herewith is a petition for writ of certiorari of the moving party.

Respectfully submitted,

David I. Bruck

DAVID I. BRUCK
1401 Calhoun Street
Columbia, S. C. 29201
Counsel for Petitioner.

July 6, 1982.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. _____

HORACE BUTLER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF HORACE BUTLER
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Horace Butler being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to pre-pay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. _____

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CHARLESTON, SC $3.35 hr

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? No

a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Horace Butler
Horace Butler

SWORN TO and subscribed before me
this 4th day of June, 1982.

Arthur M. Butler
Notary Public for South Carolina

My Commission Expires: My Commission Expires May 29, 1982

RECEIVED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. A-866

A-1009

Horace Butler,

Petitioner,

v.

State of South Carolina,

Respondent.

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable Warren E. Burger, Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

The petitioner, Horace Butler, prays that an order be entered extending the time for filing a petition for writ of certiorari to and including July 6, 1982. This application is submitted more than ten days prior to the scheduled filing date for the petition. The pertinent dates are:

February 22, 1982: Petitioner's conviction was affirmed by the Supreme Court of South Carolina.

April 6, 1982: Petitioner's motions for a rehearing and a stay of execution were denied by the Supreme Court of South Carolina.

April 15, 1982: Petitioner's scheduled execution stayed by order of the Chief Justice of the United States, pending disposition of the petition for certiorari.

June 4, 1982: Expiration of time for filing petition for writ of certiorari in this Court, unless extended.

July 6, 1982: Expiration of requested thirty day extension of time for filing a petition in this Court.

The pertinent facts of the case may be stated as follows:

1. Petitioner was sentenced to death in the Charleston County Court of General Sessions on January 26, 1981 upon his conviction for murder, and a subsequent jury finding that he had committed murder while in the commission of rape.

2. The petitioner appealed his case to the South Carolina Supreme Court in which appeal he raised ultimately eleven (11) issues, several of a substantial constitutional nature. The petitioner intends to raise the following federal constitutional claims in his petition for a writ of certiorari:

> (a) that petitioner's rights under the Eighth and Fourteenth Amendments were violated by jury instructions at his sentencing hearing which defined a reasonable doubt as "not a weak or slight doubt, but...a serious, a strong or substantial well-founded doubt as to the truth of the matter asserted by the state," and as "a substantial doubt for which an honest person seeking the truth can give a real reason," and
>
> (b) that petitioner's rights under the Eighth and Fourteenth Amendments were denied by the imposition and affirmance of a sentence of death upon evidence of a statutory aggravating circumstance which was insufficient to convince any rational trier of fact beyond a reasonable doubt, and by the failure of the State Supreme Court to apply the standard enunciated by this Court in Jackson v. Virginia, 443 U.S. 307 (1979), to the sufficiency of such evidence in aggravation during its mandatory review of appellant's sentence of death.

These issues were presented to the South Carolina Supreme Court on direct appeal, and were decided adversely to petitioner. A copy of the Supreme Court's opinion is attached to this application. This Court's jurisdiction under 28 U.S.C. §1257(3) will be invoked.

This extension of time is requested since (1)this is a death penalty case and as such carries the risk of the attendant possible ultimate sanction upon petitioner and is therefore a matter for which counsel needs sufficient time to insure careful and complete attention to the issues to be presented to this Court; (2)the petition for a writ of certiorari will contain substantial federal constitutional issues, as indicated above, which require extensive research and careful drafting and to which counsel cannot do justice unless an extension of time is granted; (3)undersigned counsel is presently sole defense counsel for eight (8) other defendants in death penalty appeals now pending before the South Carolina Supreme Court and faces appeal docket requirements which limit the amount of time currently available to devote to the drafting of the petition for the writ of certiorari, and more specifically that undersigned counsel has a death penalty appellate brief in another case due on May 31, 1982, and further that he is scheduled to present oral argument in another death penalty appeal before the South Carolina Supreme Court on or about June 7, 1982; and (4)unless an extension of time is granted, it is extremely unlikely that the substantial issues involved will be presented in the most clear and concise fashion for the consideration of this Court.

Since petitioner continues to be incarcerated in prison and a stay has been issued by this Court, no prejudice to the State's concerns can result from this requested extension.

WHEREFORE, petitioner respectfully requests an order extending the time for filing his petition for a writ of certiorari to and including July 6, 1982.

Respectfully submitted,

David I. Bruck

DAVID I. BRUCK
Attorney for Petitioner

1401 Calhoun Street
Columbia, S. C. 29201
(803)758-8601

This 21st day of May, 1982.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Horace Butler, ... Appellant.

Appeal From Charleston County
C. Anthony Harris, Judge

Opinion No. 21647
Filed February 22, 1982

AFFIRMED

David I. Bruck, of S. C. Commission of Appellate Defense, of Columbia; and W. McAlister Hill, of Ravenel, for appellant.

Attorney General Daniel R. McLeod, Assistant Attorney General Lindy P. Funkhouser and Senior Assistant Attorney General Brian P. Gibbes, all of Columbia; and Assistant Solicitor Steve Schmutz, of Charleston, for respondent.

NESS, A. J.: This is a death penalty case. Butler was convicted for the murder of Pamela Lane and sentenced to death. We affirm.

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Considering the entire colloquy with this venireman it is clear that he was properly qualified. State v. Gilbert & Gleaton, ___ S. C. ___, 283 S. E. 2d 179 (1981). This exception is without merit.

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Appellant argues this violated S. C. Code §8-15-50, §19-1-80 and §19-1-90 since a copy was not provided at the time the statement was made. We disagree.

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Appellant contends the trial court erred in refusing to charge manslaughter. He told police on the night of the murder he stopped to talk to the victim and invited her to go for a ride. He stated the victim voluntarily ditched her brand new motorbike in the bushes and got in his car. He then drove to a secluded, wooded area where the deceased openly seduced him, re-dressed herself and calmly informed him that she was going to "cry rape" because she needed an excuse for arriving home late. Appellant said he "panicked" and shot her, then dumped her body over a bridge into a stream.

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There were no actions by deceased to constitute legal provocation, hence a charge on voluntary manslaughter was not required. This argument has no merit.

Appellant next claims his state constitutional rights were violated because the indictments failed to specify any statutory aggravating circumstances to be passed on by a grand jury prior to the actual trial of the case. We disagree.

"The purpose of the bifurcated trial proceeding is to permit the introduction of evidence at the pre-sentence hearing that normally would be inadmissible at the guilt determination proceeding." State v. Shaw, 273 S. C. 194, 208, 255 S. E. 2d 799 at 806 (1979). Our statutory death penalty scheme was purposefully designed to withhold matters inadmissible on the issue of guilt or innocence from the jury until that issue has been determined. State v. Shaw, supra. Also see Eberheart v. State, 206 S. E. 2d 12 (Ga. 1974). This system affords greater protection to the accused since the imposition of death by public authority is so "profoundly different" from any other sanction. Lockett v. Ohio, 438 U. S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) as cited in State v. Shaw, supra, 255 S. E. 2d at 805.

We agree with appellant that fairness and due process of law require that the defendant receive notice of the charges against him sufficient to enable him to prepare his defense. S. C. Code §17-19-20 (1976); State v. Hiott, 276 S. C. 72, 276 S. E. 2d 163 (1981); State v. Tabory, 262 S. C. 136, 202 S. E. 2d 852 (1974). We disagree, however, with the assertion that this notice requires the aggravating circumstances be set out in the indictment for consideration by the grand jury.

The punishment for a crime is not and never has been considered a part of the pleading charging a crime. The indictment here is for murder, not rape. The statute charging the crime defines murder and provides for notice and due process. S. C. Code, §16-3-10, et seq. (1976).

Notice is sufficient where the statutory requirements are met. The statute does not require the aggravating circumstance to be included in the indictment. S. C. Code §16-3-26 (1976). Moreover, appellant concedes he was given sufficient notice.

The required notice referred to by appellant in Article I, §11 of the S. C. Constitution was met when appellant was indicted before the grand jury for murder. The death sentence he received was for murder, not for the aggravating circumstance. Rape. There is no error.

Appellant asserts there was insufficient evidence to submit the aggravating circumstance of rape to the jury. A trial court is concerned only with the existence of evidence, not its weight. State v. Gunter, 273 S. C. 347, 256 S. E. 2d 317 (1979). And the evidence must be viewed in the light most favorable to the State. State v. Hill, 268 S. C. 390, 234 S. E. 2d 219 (1977), cert. den., 434 U. S. 870, 98 S. Ct. 211, 54 L. Ed. 2d 147 (1977). Any evidence direct or circumstantial reasonably tending to prove the guilt of the accused creates a jury issue. State v. Hill, supra.

The trial court found: (1) the victim received a blow to her head (serious enough to cause brain damage) prior to death; (2) the appellant was armed with a deadly weapon; (3) the presence of semen in victim's vaginal area; (4) physician's testimony that semen could have come from a male of appellant's blood type, and (5) decedent was thereafter killed. There was sufficient evidence to submit the aggravating circumstance to the jury. This argument has no merit.

Appellant alleges the trial judge erred in instructing the jury on the law of reasonable doubt and in failing to instruct the jury of the consequences of a "hung jury."

Appellant relies on In The Matter of Winship, 397 U. S. 358, 90 S. Ct. 1068 (1970) where the U. S. Supreme Court held that a defendant cannot be found guilty of a criminal offense without establishing his guilt "with utmost certainty." Id. 1073. Here the trial judge defined reasonable doubt as "....a substantial doubt for which an honest person seeking the truth can give a real reason," and as "not a weak or slight doubt, but it is a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state." We recently held, "[i]t is not error to equate substantial doubt with reasonable doubt." State v. Griffin, Op. No. 21600, Smith's 11/24/81, page 13.

These instructions are well within the acceptable guidelines set by this Court and In Re Winship, supra. There is no error present.

Moreover, each member of the jury was polled and there was no indication of disagreement. The jury's verdict here was unanimous thus no possible prejudice resulted.

Finally, the constitutionality of §16-3-25(c)(3) has been fully settled by this Court and appellant's exception alleging otherwise is without merit. State v. Shaw, 273 S. C. 194, 255 S. E. 2d 799 (1979), cert. den., 444 U. S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329.

We are required under §16-3-25 to determine whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases. State v. Shaw & Roach, 273 S. C. 194, 255 S. E. 2d 799 (1979). The record clearly reflects appellant maliciously and purposefully committed a brutal murder accompanied by rape. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case.

We have carefully reviewed the entire record for any prejudicial error and find none. Appellant's murder conviction and death sentence are affirmed.

AFFIRMED.

LEWIS, C.J., LITTLEJOHN, GREGORY and HARWELL, JJ., concur.

The Supreme Court of South Carolina

FRANCES H. SMITH
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

April 6, 1982

David I. Bruck, Esquire
S. C. Commission of Appellate Defense
1401 Calhoun Street
Columbia, South Carolina 29201

Re: The State v. Horace Butler

Dear Mr. Bruck:

The Court has this day refused your Petition for Rehearing and Petition for Stay of Execution in the following order:

"Petition Denied.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

April 6, 1982"

The remittitur is being sent down today.

Very truly yours,

Frances H. Smith
CLERK

FHS/cm

cc: The Honorable Brian P. Gibbes

APPENDIX B

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. A-866

Horace Butler,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 1982, three copies of Petitioner's Application for Extension of Time in which to File Petition for Writ of Certiorari were mailed, postage prepaid, to the below named counsel for the Respondent. I further certify that all parties required to be served have been so served.

Brian P. Gibbes
Office of the Attorney General
State of South Carolina
P. O. Box 11549
Columbia, South Carolina 29211

David I. Bruck

DAVID I. BRUCK

Counsel for Petitioner

1401 Calhoun Street
Columbia, S. C. 29201
(803) 758-8601

David I. Bruck
Attorney at Law
1401 Calhoun Street
Columbia, South Carolina 29201
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May 21, 1982

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MAY 24 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

A-1009

Honorable Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D. C. 20543

RE: Butler v. South Carolina
A-866

Dear Sir:

Please find enclosed an original and one copy, with proof of service, of an Application for Extension of Time in Which to File Petition for Writ of Certiorari addressed to the Chief Justice as Circuit Justice.

Sincerely,

David I. Bruck

David I. Bruck
Attorney for petitioner

DIB/br

Enclosures

cc: Brian P. Gibbes
Office of the Attorney General
State of South Carolina

Supreme Court of the United States

No. A-866

Horace Butler,

Petitioner,

v.

South Carolina

O R D E R

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the execution and enforcement of the sentence of death imposed upon the petitioner and scheduled for April 30, 1982, be, and the same is hereby, stayed pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

Chief Justice of the United States

Dated this 15th day of April, 1982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

RECEIVED
APR 13 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Horace Butler,

Petitioner,

v.

A-866

The State of South Carolina,

Respondent.

APPLICATION FOR STAY OF EXECUTION

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit:

Petitioner Horace Butler prays that an Order be entered, pursuant to 28 U.S.C. Section 2101(f), staying the execution of his death sentence, scheduled for April 30, 1982, pending a final disposition in this Court of his petition for a writ of certiorari. In support of this application, Petitioner respectfully shows:

1. Petitioner was convicted of murder, and was sentneced to death by a jury in the Charleston County court of general sessions on January 26, 1981.

2. Both the conviction and death sentence were affirmed by the Supreme Court of South Carolina on February 22, 1982, in an as yet unreported opinion which is annexed hereto as Appendix A.

3. Petitioner's timely requests for rehearing and for stay of execution pending final disposition of a petition for writ of certiorari in this Court were denied by the Supreme Court of South Carolina by order of April 6, 1982, annexed hereto as Appendix B.

4. On April 7, 1982, the Supreme Court of South Carolina

instructed the Clerk of that court to order the Commissioner of the State Department of Corrections to carry out the death sentence upon Petitioner on the fourth Friday after receipt of such order, as required by S.C. Code §17-25-370 (1976). A copy of these orders are annexed hereto as Appendix C and D.

5. Petitioner will therefore be executed on April 30, 1982, unless a stay of execution is granted by this Court.

6. Among the substantial constitutional claims of which Petitioner intends to seek review by this Court are the following:

(a) Petitioner's rights under the Eighth and Fourteenth Amendments were violated by jury instructions at his sentencing hearing which defined a reasonable doubt as "not a weak or slight doubt, but. . .a serious a strong or substantial well-founded doubt as to the truth of the matter asserted by the state," and as "a substantial doubt for which an honest person seeking the truth can give a real reason."

(b) Petitioners' rights under the Eighth and Fourteenth Amendments were denied by the imposition and affirmance of a sentence of death upon evidence of a statutory aggravating circumstance which was insufficient to convince any rational trier of fact beyond a reasonable doubt, and by the failure of the state Supreme Court to apply the standard enunciated by this Court in Jackson v. Virginia, 443 U.S. 307 (1979), to the sufficiency of such evidence in aggravation during its mandatory review of appellant's sentence of death.

7. Petitioner is presently in the custody of the Warden of the Central Correctional Institution, South Carolina Department of Corrections, Columbia, South Carolina. A stay of execution would neither prejudice the State of South Carolina nor interfere with Petitioner's custodial status, but is necessary to assure that Petitioner is not executed before this Court can consider and determine the issues to be raised in his petition for a writ of certiorari.

WHEREFORE, Petitioner respectfully requests an order staying his execution pending further order of this Court.

Respectfully submitted,

David I. Bruck

DAVID I. BRUCK
Counsel for Petitioner

April 9, 1982.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Horace Butler, ... Appellant.

Appeal From Charleston County
C. Anthony Harris, Judge

Opinion No. 21647
Filed February 22, 1982

AFFIRMED

David I. Bruck, of S. C. Commission of Appellate Defense, of Columbia; and W. McAlister Hill, of Ravenel, for appellant.

Attorney General Daniel R. McLeod, Assistant Attorney General Lindy P. Funkhouser and Senior Assistant Attorney General Brian P. Gibbes, all of Columbia; and Assistant Solicitor Steve Schmutz, of Charleston, for respondent.

NESS, A. J.: This is a death penalty case. Butler was convicted for the murder of Pamela Lane and sentenced to death. We affirm.

First Butler asserts certain jurors were wrongfully disqualified from jury duty due to their unwillingness to impose the death penalty. This issue has been decided adversely to appellant and is without merit. State v. Linder, ___ S. C. ___, 278 S. E. 2d 335 (1981); State v. Hyman, ___ S. C. ___, 281 S. E. 2d 209 (1981).

Appellant also argues juror Jennings V. Knight should have been disqualified alleging his answers on voir dire indicated he would automatically vote in favor of the death penalty. We disagree. Knight was questioned as follows:

By Defense Counsel:

"Q. Would you automatically send him to death?

"A. Well, according to the evidence what was in the court, what we judged him by." (Tr. 385, f. 18-20).

By the Court:

"Q. Could you return life imprisonment if you thought that was warranted?

"A. Yes." (Tr. 389, f. 5-7).

Considering the entire colloquy with this venireman it is clear that he was not properly qualified. State v. Gilbert & Gleaton, ___ S. C. ___, 283 S. E. 2d 179 (1981). This exception is without merit.

Appellant next argues the trial court erred in admitting testimony that appellant was "known to carry a gun" where appellant's character had not been put in issue. Immediately prior to the disputed question the same witness testified appellant was carrying a pistol on the night of the murder. (Tr. 727, f. 17, to 728, f. 8). The testimony was merely cumulative since it did no more than bolster the fact that the jury was aware of a pistol on appellant's person. There was no error. State v. Blackburn, 271 S. C. 324, 247 S. E. 2d 334 (1978).

APPENDIX A

Appellant asserts the trial court erred in admitting into evidence two written confessions since appellant was not provided with a copy of these statements when made. This was due to a malfunction of the copy machine at the police station. Butler was given a copy three weeks later, prior to the preliminary hearing and approximately four months before trial.

Appellant argues this violated S. C. Code §8-15-50, §19-1-30 and §19-1-90 since a copy was not provided at the time the statement was made. We disagree.

South Carolina Code sections shall not be applied in a hypertechnical manner. State v. Jones, 228 S. C. 484, 91 S. E. 2d 1 (1956). There is nothing in the record to indicate there was any prejudice to appellant's rights. See generally, State v. Crenshaw, et al., 274 S. C. 475, 266 S. E. 2d 61 (1980); State v. Scott, 269 S. C. 438, 237 S. E. 2d 886 (1977). Clearly, appellant had ample time to prepare his case after receiving a copy of the confession. Appellant is due a fair trial, not a perfect one. This exception is without merit.

Appellant contends the trial court erred in refusing to charge manslaughter. He told police on the night of the murder he stopped to talk to the victim and invited her to go for a ride. He stated the victim voluntarily ditched her brand new motorbike in the bushes and got in his car. He then drove to a secluded, wooded area where the deceased openly seduced him, re-dressed herself and calmly informed him that she was going to "cry rape" because she needed an excuse for arriving home late. Appellant said he "panicked" and shot her, then dumped her body over a bridge into a stream.

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation. State v. Norris, 253 S. C. 31, 168 S. E. 2d 564 (1969). Where death is caused by the use of a deadly weapon words alone are not sufficient to constitute a legal provocation. State v. Gardner, 219 S. C. 97, 64 S. E. 2d 130 (1951).

There were no actions by deceased to constitute legal provocation, hence a charge on voluntary manslaughter was not required. This argument has no merit.

Appellant next claims his state constitutional rights were violated because the indictments failed to specify any statutory aggravating circumstances to be passed on by a grand jury prior to the actual trial of the case. We disagree.

"The purpose of the bifurcated trial proceeding is to permit the introduction of evidence at the pre-sentence hearing that normally would be inadmissible at the guilt determination proceeding." State v. Shaw, 273 S. C. 194, 208, 255 S. E. 2d 799 at 806 (1979). Our statutory death penalty scheme was purposefully designed to withhold matters inadmissible on the issue of guilt or innocence from the jury until that issue has been determined. State v. Shaw, supra. Also see Eberheart v. State, 206 S. E. 2d 12 (Ga. 1974). This system affords greater protection to the accused since the imposition of death by public authority is so "profoundly different" from any other sanction. Lockett v. Ohio, 438 U. S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) as cited in State v. Shaw, supra, 255 S. E. 2d at 805.

We agree with appellant that fairness and due process of law require that the defendant receive notice of the charges against him sufficient to enable him to prepare his defense. S. C. Code §17-19-20 (1976); State v. Hiott, 276 S. C. 72, 276 S. E. 2d 163 (1981); State v. Tabory, 262 S. C. 136, 202 S. E. 2d 632 (1974). We disagree, however, with the assertion that this notice requires the aggravating circumstances be set out in the indictment for consideration by the grand jury.

The punishment for a crime is not and never has been considered a part of the pleading charging a crime. The indictment here is for murder, not rape. The statute charging the crime defines murder and provides for notice and due process. S. C. Code, §16-3-10, et seq. (1976).

Notice is sufficient where the statutory requirements are met. The statute does not require the aggravating circumstance to be included in the indictment. S. C. Code §16-3-26 (1976). Moreover, appellant concedes he was given sufficient notice.

The required notice referred to by appellant in Article I, §11 of the S. C. Constitution was met when appellant was indicted before the grand jury for murder. The death sentence he received was for murder, not for the aggravating circumstance, rape. There is no error.

Appellant asserts there was insufficient evidence to submit the aggravating circumstance of rape to the jury. A trial court is concerned only with the existence of evidence, not its weight. State v. Gunter, 273 S. C. 347, 256 S. E. 2d 317 (1979). And the evidence must be viewed in the light most favorable to the State. State v. Hill, 268 S. C. 390, 234 S. E. 2d 219 (1977), cert. den., 434 U. S. 870, 98 S. Ct. 211, 54 L. Ed. 2d 147 (1977). Any evidence direct or circumstantial reasonably tending to prove the guilt of the accused creates a jury issue. State v. Hill, supra.

The trial court found: (1) the victim received a blow to her head (serious enough to cause brain damage) prior to death; (2) the appellant was armed with a deadly weapon; (3) the presence of semen in victim's vaginal area; (4) physician's testimony that semen could have come from a male of appellant's blood type, and (5) decedent was thereafter killed. There was sufficient evidence to submit the aggravating circumstance to the jury. This argument has no merit.

Appellant alleges the trial judge erred in instructing the jury on the law of reasonable doubt and in failing to instruct the jury of the consequences of a "hung jury."

Appellant relies on In The Matter of Winship, 397 U. S. 358, 90 S. Ct. 1068 (1970) where the U. S. Supreme Court held that a defendant cannot be found guilty of a criminal offense without establishing his guilt "with utmost certainty." Id. 1073. Here the trial judge defined reasonable doubt as "....a substantial doubt for which an honest person seeking the truth can give a real reason," and as "not a weak or slight doubt, but it is a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state." We recently held, "[i]t is not error to equate substantial doubt with reasonable doubt." State v. Griffin, Op. No. 21600, Smith's 11/24/81, page 13.

These instructions are well within the acceptable guidelines set by this Court and In Re Winship, supra. There is no error present.

Moreover, each member of the jury was polled and there was no indication of disagreement. The jury's verdict here was unanimous thus no possible prejudice resulted.

Finally, the constitutionality of §16-3-25(c)(3) has been fully settled by this Court and appellant's exception alleging otherwise is without merit. State v. Shaw, 273 S. C. 194, 255 S. E. 2d 799 (1979), cert. den., 444 U. S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329.

We are required under §16-3-25 to determine whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases. State v. Shaw & Roach, 273 S. C. 194, 255 S. E. 2d 799 (1979). The record clearly reflects appellant maliciously and purposefully committed a brutal murder accompanied by rape. The death penalty is proportionate to a crime of this nature and to the crime and defendant in this case.

We have carefully reviewed the entire record for any prejudicial error and find none. Appellant's murder conviction and death sentence are affirmed.

AFFIRMED.

LEWIS, C.J., LITTLEJOHN, GREGORY and HARWELL, JJ., concur.

The Supreme Court of South Carolina

FRANCES H. SMITH
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

April 6, 1982

David I. Bruck, Esquire
S. C. Commission of Appellate Defense
1401 Calhoun Street
Columbia, South Carolina 29201

Re: The State v. Horace Butler

Dear Mr. Bruck:

The Court has this day refused your Petition for Rehearing and Petition for Stay of Execution in the following order:

"Petition Denied.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

April 6, 1982"

The remittitur is being sent down today.

Very truly yours,

Frances H. Smith
CLERK

FHS/cm

cc: The Honorable Brian P. Gibbes

APPENDIX B

The Supreme Court of South Carolina

Appeal from Charleston County

The State,

Respondent,

v.

Horace Butler,

Appellant.

ORDER

The appellant, Horace Butler, was convicted of murder in the Court of General Sessions for Charleston County and sentenced to death by electrocution. On appeal to this Court, the conviction and sentence were affirmed in Opinion No. 21647, filed on February 22, 1982. Petition for Rehearing and Petition for Stay of Execution were filed on March 3, 1982. These Petitions were denied by this Court on April 6, 1982.

The remittitur in this case has been sent down to the Clerk of the Court of General Sessions for Charleston County, and the Clerk of this Court is directed to proceed under the terms of Section 17-25-370 of the 1976 Code.

C.J.

A.J.

A.J.

A.J.

Columbia, South Carolina

April 7, 1982.

CERTIFIED TRUE COPY.

Deputy Clerk, S. C. Supreme Court

APPENDIX C

The Supreme Court of South Carolina

Appeal From Charleston County

The State,

Respondent,

v.

Horace Butler,

Appellant.

ORDER

TO THE HONORABLE WILLIAM D. LEEKE, COMMISSIONER, STATE DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the case of The State v. Horace Butler was affirmed by this Court in Opinion No. 21647, filed on February 22, 1982.

Petition for Rehearing and Petition for Stay of Execution were filed in this Court on March 3, 1982. These Petitions were denied by the Court on April 6, 1982, and the remittitur has been sent down to the Clerk of the Court of General Sessions for Charleston County.

IT IS, THEREFORE, required of you by Section 17-25-370 of the Code of Laws of South Carolina, 1976, entitled: "Execution of Death Sentence Upon Affirmance of Judgment or Dismissal or Abandonment of Appeal" to execute the judgment and sentence of death imposed on the said appellant, Horace Butler, on the fourth Friday after the service upon you or receipt of this notice.

Let a copy of this notice be served immediately upon the appellant, Horace Butler.

Frances N. Smith
CLERK

Columbia, South Carolina

April 7, 1982.

CERTIFIED TRUE COPY.
Rebecca D. Mims
Deputy Clerk, S. C. Supreme Court

APPENDIX D

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

Horace Butler,

Petitioner,

v.

State of South carolina,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on ths 9th day of April, 1982, three copies of Petitioner's Application for a Stay of Execution were mailed, postage prepaid, to the below named counsel for the Respondent. I further certify that all parties required to be served have been so served.

Brian P. Gibbes
Office of the Attorney General
State of South Carolina
P. O. Box 11549
Columbia, South Carolina 29211

David I. Bruck

DAVID I. BRUCK

Counsel for Petitioner

1401 Calhoun Street
Columbia, S. C. 29201
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